

825 KAR 1:020. Administrative hearings procedures.

RELATES TO: KRS Chapter 13B, 351.025(1), (2), (5), 351.070(15), 351.1041(1), (7), (8), 351.105(11), 351.120, 351.184, 351.194.

STATUTORY AUTHORITY: KRS 351.194(1), KRS 351.025(5).

NECESSITY, FUNCTION, AND CONFORMITY: KRS 351.194(1) and KRS 351.025(5) require the Mine Safety Review Commission to promulgate administrative regulations to establish administrative hearing and review procedures in accordance with KRS Chapter 13B. This administrative regulation supplements the provisions of KRS Chapter 13B by establishing procedures for the filing, evaluation, and disposition of complaints and petitions of appeal.

Section 1. The provisions of KRS 13B.010 through 13B.170 and this administrative regulation shall govern all hearings conducted pursuant to KRS 351.1041(1)(a) and KRS 351.025(5).

Section 2. Practice Before the Commission. (1) The hearing shall be adversarial and presided over by a hearing officer assigned by the commission, which may include a member of the commission or an independent hearing officer, who shall conduct the hearing in accordance with KRS 13B.050 to 13B.130. If a complaint is filed by the Office of Mine Safety and Licensing, the charges and evidence against the respondent shall be filed by an attorney from the Natural Resources Legal Division of the Office of Legal Services, Environmental and Public Protection Cabinet. If a petition of appeal is filed by an individual or licensee, an attorney for the Natural Resources Legal Division of the Office of Legal Services shall represent the Office of Mine Safety and Licensing.

(2) An individual may file a petition of appeal or a response to a complaint pro se. In accordance with S.C.R. 3.020, all other petitioners or respondents shall be represented by an attorney admitted to practice law in the Commonwealth of Kentucky.

(3) Entry of Appearance. A representative of a party shall enter an appearance in a proceeding under this administrative regulation by:

- (a) Signing the first document filed with the commission on behalf of a party;
- (b) Filing a written entry of appearance with the commission; or
- (c) With the permission of the hearing officer, orally entering an appearance in open hearing.

(4) Withdrawal of appearance. A representative desiring to withdraw his appearance shall file a motion with the commission. The motion to withdraw may, in the discretion of the hearing officer, be denied if necessary to avoid undue delay or prejudice to the rights of a party.

Section 3. Parties, Intervenor, and Amici Curiae. (1) Party status. For the purposes of KRS 13B.140(1), the agency named as a party for an appeal of a final disposition from the Mine Safety Review Commission is the Office of Mine Safety and Licensing.

(2) Intervention. The procedure for intervention shall be governed by the provisions of KRS 13B.060. In denying a motion to intervene, the hearing officer may permit the movant to participate in the proceeding as amicus curiae.

(3) Participation as amicus curiae. A person may move to participate as amicus curiae in a proceeding before the commission. Participation as amicus curiae shall not be a matter of right, but of the sound discretion of the hearing officer. A motion for participation as amicus curiae shall set forth the interest of the movant and show that granting the motion will not unduly delay or prejudice the adjudication of the issues. If the hearing officer permits amicus curiae participation, his order shall specify the schedule for filing and replying to the amicus

curiae memorandum, brief, or other pleading. The movant may attach its memorandum, brief, or other pleading to its motion for participation as amicus curiae.

Section 4. Commencement of Action or Petition of Appeal. (1) An action shall be instituted by the Office of Mine Safety and Licensing by filing with the commission a verified complaint which shall contain the following information:

(a) The name, address, and license number, or certification identification of the alleged violator;

(b) If the alleged violator is a corporation, the address and license number of the corporation and the name and address of the process agent;

(c) The section of the statutes or administrative regulations alleged to have been violated and the minimum and maximum penalties provided for the violation;

(d) A statement of the factual basis for the department's action and a statement of issues involved, in sufficient detail to give the parties reasonable opportunity to prepare evidence and arguments;

(e) The history of the alleged violator's previously-adjudicated violations before the commission or its predecessor; and

(f) Any supporting documents addressed in the statement.

(2)(a) The following individuals or licensed facility may file a petition for review of the suspension issued, certification denied, application rejected or denied, or penalty assessed:

1. Any individual whose certification issued pursuant to KRS 351.120(1) has been suspended by the Commissioner of the Department for Natural Resources pursuant to KRS 351.120(12) for violation of drug or alcohol-free status or refusal to submit to a drug or alcohol test as authorized by statute;

2. Any applicant for certification as a new miner or initial applicant for all other job certifications authorized by statute who is denied certification by the Office of Mine Safety and Licensing due to the results of drug and alcohol testing pursuant to KRS 351.184;

3. Any licensee or license applicant whose application for certification of a drug-free workplace program has been rejected or denied pursuant to 805 KAR 11:010 or 805 KAR 11:020; or

4. Any licensed facility against whom penalties have been assessed by the Commissioner of the Department for Natural Resources pursuant to KRS 351.070(15).

(b)1. The petition of appeal shall be filed within thirty (30) days of service of the notice of suspension by the Commissioner of the Department for Natural Resources, the notice of results of testing resulting in denial of certification by the Office of Mine Safety and Licensing, the notification of rejection or denial of the application for certification of a drug-free work program by the Office of Mine Safety and Licensing, or the notice of assessment of penalties by the Commissioner of the Department for Natural Resources. 2. The petition of appeal shall include:

a. A statement of the law and facts in issue in regard to the suspension or denial of certification, rejection or denial of the application, or assessment of penalties; and

b. A statement of the petitioner's position as to the law and facts and a recitation of the relief sought by the petitioner.

(3)(a) For any person seeking appeal from (2) above or any other authorized appeal of action by the Office of Mine Safety and Licensing, the complaint or petition of appeal shall be filed with the Mine Safety Review Commission, 132 Brighton Park Boulevard, Frankfort, Kentucky. At the time of filing, the complaint or petition of appeal shall be assigned a case number, which shall be used in the future proceedings of the matter.

(b) Timely filing. A petition of appeal shall be deemed timely filed when it is received by the

commission within the time specified for filing except that a petition of appeal shall be deemed timely filed if it has been transmitted by United States registered or certified mail, or by other recognized mail carriers, with the date the mail carrier received the petition from the sender noted by the mail carrier on the outside of the container or envelope used for transmitting the petition, within the time allowed for filing.

Section 5. Probable Cause Hearing; Notice of Hearing. (1) Upon receipt of a verified complaint filed by the Office of Mine Safety and Licensing, the commission shall place the complaint on its agenda for a probable cause hearing to be reviewed at the next regularly-scheduled meeting of the commission, or as soon as practicable.

(a) The probable cause hearing shall not be adversarial in nature. Testimonial evidence shall not be taken. The determination of probable cause shall be based upon the content of the verified complaint alone.

(b) If the commission finds that probable cause exists, it shall issue an order in accordance with KRS 351.194(3).

(c) The commission shall dismiss a complaint if it does not find probable cause that a violation has occurred. The dismissal shall be without prejudice. The commission shall notify the Commissioner and attorney of record for the Natural Resources Legal Division of the Office of Legal Services of its decision.

(2) If an order setting the matter for hearing is issued by the commission, it shall mail a notice of hearing to the following:

(a) The Commissioner of the Department for Natural Resources;

(b) The attorney of record for the Natural Resources Legal Division of the Office of Legal Services; and

(c) The respondent named in the verified complaint at the address shown in the complaint.

(3) The notice of hearing shall be sent by certified mail, return receipt requested, in compliance with KRS 13B.050.

Section 6. Notice of Hearing Regarding Petition of Appeal. (1) Upon receipt of a petition of appeal, the commission shall set the matter for hearing unless the petition is deemed by the commission to be:

(a) Not well grounded in fact or warranted by existing law or a good faith argument for the extension of same;

(b) Filed for an improper purpose; or

(c) Frivolous.

(2) The commission shall mail a notice of hearing to the following:

(a) The petitioner or counsel for the petitioner, if the petitioner is represented by counsel; and

(b) The General Counsel of the Natural Resources Legal Division of the Office of Legal Services.

(3) The notice of hearing shall be sent by mail, return receipt requested, in compliance with KRS 13B.050.

Section 7. Answer of the Respondent. (1) The respondent shall file a response to the complaint with the commission, with service on the attorney of record for the Natural Resources Legal Division of the Office of Legal Services, within twenty (20) days of receiving the notice of hearing. The response shall:

(a) Set forth the defense to the complaint;

(b) State mitigating circumstances; and

- (c)1. Admit or deny each assertion in the complaint; or
- 2. If appropriate, state that the respondent is without knowledge or information sufficient to form a belief as to the truth of an assertion. This statement shall be treated as a denial.
- (2) The Natural Resources Legal Division of the Office of Legal Services shall file a response to a petition for appeal with the commission, with service on the petitioner, within twenty (20) days of service of the notice of hearing. The response shall:
 - (a) Set forth the defenses to the petition; and
 - (b)1. Admit or deny each factual assertion in the petition; or
 - 2. If appropriate, state that the respondent to the petition of appeal is without knowledge or information sufficient to form a belief as to the truth of the assertion. This statement shall be treated as a denial.

Section 8. General Requirements for Pleadings and Other Documents. (1) Where to file. The original copy of all documents shall be filed with the commission. Documents filed with the commission shall be addressed to the general counsel and mailed or delivered to the Mine Safety Review Commission, 132 Brighton Park Blvd., Frankfort, Kentucky 40601. Copies shall be sent to all parties in a case, and to the hearing officer assigned to the case.

(a) The filing of complaints, petitions of appeal, or other initiating documents shall be by personal delivery, including courier service, or by registered or certified mail, return receipt requested.

(b) Subsequent documents filed with the commission may be filed by first class mail, express mail, facsimile transmission, or personal delivery. Express mail includes delivery by a third-party commercial carrier.

(c) Filing by personal delivery, mail, or facsimile transmission, is effective upon receipt, except as otherwise permitted in Section 4(3)(a) of this administrative regulation.

(d) A document filed by facsimile transmission shall be placed in the United States mail on the same day as transmission.

(2) Required information.

(a) Documents shall be legible and shall clearly identify the filing party by name on the cover page.

(b) Documents filed with the commission shall be accompanied by a statement setting forth the date and manner of service.

(c) Documents shall include the assigned docket number, page numbers, and the filing person's address and telephone number. Written notice of a change in the address or telephone number shall be given promptly to the commission, the hearing officer, and all other parties.

(3) Number of copies. The original document and four (4) copies shall be filed with the commission.

Section 9. Computation of Time. In computing a period of time prescribed by this administrative regulation, the day from which the designated period begins to run shall not be included. The last day of the period shall be included unless it is a Saturday, Sunday, or state holiday, in which event the period runs until the end of the next business day.

Section 10. Extensions of Time. (1) The time for filing or serving a document may be extended for good cause shown. A motion requesting an extension of time shall be received no later than three (3) days prior to the expiration of the time allowed for filing or serving the document.

(2) An extension of time may be granted even though the request was filed after the

designated time for filing has expired if:

- (a) Exigent circumstances exist; and
- (b) The requesting party shows, in writing, the reason for the party's failure to make the request before the prescribed time expired.

Section 11. Motions. (1) An application for an order shall be by motion which, unless made during a hearing or a prehearing conference, shall be made in writing and shall set forth the relief or order sought.

(2) A party opposing a written motion shall file a statement in opposition within ten (10) calendar days after service upon the party. Unless otherwise ordered, oral argument on motions shall not be heard.

Section 12. Withdrawal of a Pleading. A party may withdraw a pleading at any stage of a proceeding with the approval of the commission or a hearing officer.

Section 13. Consolidation of Proceedings. The commission or a hearing officer may, upon their own or a party's motion, order the consolidation of proceedings that involve similar issues.

Section 14. Hearing Sites. Each case shall be assigned a hearing site by order of the Hearing Officer giving due regard to: (1) The convenience and necessity of the parties or their representatives and witnesses;

- (2) The availability of suitable hearing facilities; and
- (3) Other relevant factors.

Section 15. Prehearing Conferences. Prehearing conferences shall be conducted in accordance with KRS 13B.070.

Section 16. Powers of Hearing Officers. A hearing officer is empowered to act in accordance with the provisions of KRS Chapter 13B.

Section 17. Discovery. Discovery shall be conducted in accordance with KRS 13B.080(3).

Section 18. Failure to Cooperate in Discovery. Upon the failure of any person, including a party, to respond to a discovery request, or upon an objection to such a request, the party seeking discovery may file a motion with the hearing officer requesting an order compelling discovery pursuant to KRS 13B.080(3). For good cause shown the hearing officer may excuse an objecting party from complying with the request.

Section 19. Subpoenas. (1) The commission and its hearing officers may issue subpoenas, on their own motion or on the oral or written application of a party, requiring the attendance of witnesses and the production of documents or physical evidence.

(2) A subpoena may be served by a person at least eighteen (18) years of age. A subpoena may also be served by registered or certified mail, return receipt requested, with risk of delivery on the serving party.

(3) A copy of the subpoena bearing a certificate of service shall be filed with the commission.

(4) A subpoena shall be enforced in accordance with KRS 13B.080(3).

(5) If a person fails to comply with an order to testify or with a subpoena issued by the commission, the commission may initiate proceedings for the enforcement of the subpoena.

pursuant to KRS 13B.080(3).

(6) The person requesting the subpoenas shall bear the cost of serving the subpoenas. The commission shall bear the cost of witnesses subpoenaed on its behalf.

Section 20. Continuance; Proceedings in Absentia. The commission shall not postpone a case which has been scheduled for hearing, absent good cause. A request for a continuance may be considered if communicated to the commission staff reasonably in advance of the scheduled hearing date and based upon good cause. The decision whether to grant a continuance shall be made by the hearing officer.

Section 21. Settlement by Informal Proceedings. (1) In accordance with KRS 13B.070(3), the commission, through counsel may, at any time during the action, enter into informal proceedings with the respondent for the purpose of appropriately dispensing with the matter.

(2) An agreed order of settlement shall be signed by the parties and filed with the commission for final decision.

(3) The commission may employ mediation as a method of resolving the matter informally.

Section 22. Rules of Evidence. (1) Receipt of evidence shall be governed by the provisions of KRS 351.194(3) and 13B.090.

(2) Documentary evidence may be admitted in the form of copies or excerpts, and need be authenticated only to the extent that the commission is satisfied of its genuineness and accuracy.

(3) A tangible item may be received into evidence without the necessity of establishing a technical legal chain of custody if the board is satisfied that the item is:

(a) What it is represented to be; and

(b) In substantially the same condition as it was at the time of the events under consideration.

(4) The commission shall exclude evidence it considers to be unreliable, incompetent, irrelevant, immaterial, or unduly repetitious.

Section 23. Retention of Exhibits. Retention of exhibits shall be in accordance with KRS 13B.130. The commission or the hearing officer may permit the withdrawal of original exhibits:

(1) Prior to the conclusion of the hearing;

(2) Upon request and after notice to the parties; and

(3) If true copies are substituted, if practical, for the originals.

Section 24. Proposed findings, conclusions, and orders shall be made in accordance with KRS 13B.090.

Section 25. The commission shall make a decision that constitutes the final disposition of the proceedings in accordance with KRS 13B.120. If a decision is announced orally it shall be reduced to writing. An order by the commission approving a settlement proposal is a final decision of the commission.

Section 26. Ex Parte Communications. Prohibited ex parte communications shall be in accordance with KRS 13B.100. (28 Ky.R. 1949; Am. 2377; 2589; eff. 6-14-2002; 33 Ky.R. 566; 1541; eff. 12-7-06.)